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IN THE

Supreme Court of the United States

October Term, 1932

THE UNITED STATES OF AMERICA,
Petitioner,

against

HENRY PRENTISS & COMPANY, INC.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFERY & REDMOND,
Attorneys for Respondent.

JOSEPH F. MURRAY,
J. ARTHUR MATTSON,
Of Counsel.

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Statement.

Respondent is submitting in connection with this brief the affidavit of Joseph F. Murray, its counsel, to show that respondent has lost the right on its part to apply for a writ, because of the failure of the Government to comply with an oral understanding between him and the attorney for petitioner.

Facts.

Respondent filed its income and excess profits tax return for the year 1918 on June 16, 1919, and paid the tax shown to be due. On March 25, 1924, it filed its claim for refund (Plaintiff's Ex. 3, R., 97). The claim stated:

> "Taxpayer's application for special assessment was denied, despite the fact that an abnormal condi-

tion existed in both its income and invested capital.
* * *

"*In order to protect its right to secure a refund of taxes paid in excess of the tax legally due for 1918*, this claim for refund is filed upon the ground that it is entitled to relief under Sections 327-8 of the 1918 Act.

"When this claim comes up for consideration, this corporation claims the right to a hearing and to submit further evidence in connection with special assessment."

The application for special assessment mentioned in the refund claim was an application made by respondent at the time it filed its tax return for 1918, and was attached to the 1918 tax return.

Page six of the return showed that the petitioner was incorporated on September 1, 1916, and the return contained the following question and answer:

"8. Did the corporation ever take over a going business or otherwise acquire a mixed aggregate of tangible property, patents and copyrights, and good will and other similar intangible property in whole or in part with stock or other securities? Yes."

Even at the time the return was filed it appeared, therefore, that the respondent had acquired a mixed aggregate of tangible and intangible property for stock issued by it.

After the filing of the refund claim and during the years 1925 and 1926 the Treasury Department granted refunds respecting the 1918 taxes, these refunds involving many adjustments affecting both income and invested capital (Plaintiff's Exs. 16, 17, 18).

By letter dated July 16, 1925, the Commissioner informed the respondent that "your claim will be rejected" (Plaintiff's Ex. 9, R., 102, 103).

On February 23, 1926, however, the Solicitor of Internal Revenue, on the stationery of the Commissioner of Internal Revenue, wrote respondent as follows:

> "You are advised that this office has before it for consideration in connection with your income and profits taxes for 1918 and 1919, your application for special assessment. Some question has arisen as to the denial of special assessment. However, before a final decision is reached you will be granted an opportunity to be heard orally if you so desire" (R., 104).

Respondent expressed a wish for an oral hearing and March 15, 1926, was fixed as the day therefor (R., 105).

After that hearing the plaintiff executed and filed application for refund and relief dated April 8, 1926 (Plaintiff's Ex. 12). On the first page of that exhibit appears the following:

> "* * * This affidavit is submitted, together with detailed schedules attached, in support of the claims and statements discussed at said hearing."

That application contained all the facts and data upon which the present action is based, and it closed as follows:

> "It is respectfully requested that taxpayer's invested capital be adjusted and such profits tax determined as is proper and authorized by law."

Respondent upon the trial offered evidence as to what transpired at the hearings in Washington for the purpose

of showing that the very questions presented in this action were discussed and considered at the hearings in Washington. This offer of proof was rejected and exception was taken (R., 36, 37, 38).

The claim for refund was finally rejected on the rejection schedule signed by the Commissioner on September 3, 1926 (R., 85).

This action was instituted by a petition which claimed that the Commissioner of Internal Revenue erred in not increasing respondent's invested capital by including therein a certain amount for real property and an amount for intangible property acquired for stock bona fide issued. The petition alleged:

> "8. That petitioner duly filed claims for refund of overpayments of income and excess profits taxes as aforesaid, pursuant to the statutes of the United States made and provided, and pursuant to regulations of the Secretary of the Treasury prescribed pursuant to said statutes, upon the ground that said taxes had been illegally and wrongfully assessed and collected" (R., 5, 6).

Petitioner's answer, paragraph Second, specifically admitted the allegations above quoted (R., 113). That answer was filed over one year after the filing of the petition, the Government having obtained continuous extensions of time to answer. The pleadings remained as thus drawn from October, 1928, the date of the answer, to February, 1930. The case had arrived on the day calendar of the District Court on January 8, 1930, and remained thereon for approximately one month, being marked ready daily (R., 138).

It was only after that period that the Government conceived the idea that the refund claim for 1918 was insufficient, and it then made a motion to amend its answer to deny the sufficiency of the refund claim, and the affidavit in support of the motion gave as the basis for an order amending the answer that "unless such amended answer is permitted, the plaintiff undoubtedly will succeed in establishing relief which was not claimed in the claims for refund" (R., 127).

The respondent opposed the application on the ground that the Government showed no equitable grounds why it should be permitted to amend its answer at that stage of the proceedings after defending for a period of over two years on the merits. The motion was granted, however, and an amended answer served in which it denied part of the allegations of paragraph Eighth of the petition.

However, that very amended answer admits that the Commissioner of Internal Revenue refused to include in the invested capital of the respondent the sums set forth in the petition for real estate and intangibles (R., 12).

There could be no refusal without a request, and therefore on the Government's own pleading it stands admitted that respondent requested the Commissioner to include the two items in question in its invested capital and he refused to do so. Therefore, the Commissioner was not deprived of any knowledge or in any way misled, and he was not denied the privilege of passing upon the merits of plaintiff's tax liability under the return filed and the refund claim.

POINT I.

Prior to the formal rejection of respondent's claim for refund the Commissioner was advised of the claims set up in this action, consideration was given to them and they were rejected.

The original claim for refund for the year 1918 sought an adjustment of respondent's invested capital under Sections 327-8 of the Revenue Act of 1918 known as the Special Assessment provisions. The suit as instituted sought an adjustment of respondent's invested capital under Section 326 of the Revenue Act of 1918 by including therein certain items for real property and intangibles acquired by purchase for stock of the respondent. The adjustment of invested capital is what was sought by respondent from the beginning.

We claim that sufficient facts were continually before the Commissioner from the time of the filing of the 1918 return to put him on notice that the invested capital should be increased under Section 326. As above stated, however, no increase was asked under Section 326 by the refund claim as originally filed.

However, before the formal rejection of the 1918 refund claim, the Commissioner was specifically advised of the claim that the invested capital should be increased under Section 326 by the inclusion therein of the items for real estate and intangible property. We endeavored to prove upon the trial that at oral hearings at Washington the claim was advanced. We claim the Court erred in refusing to admit that evidence. However that may be, the same result may be accomplished by reason of the fact that the defendant's amended answer specifically admits that the Com-

missioner *refused* to include in invested capital the items claimed by the suit. Naturally, a refusal presupposes a claim or demand, and a consideration of that claim or demand. We do not understand that the Government controverts the fact that these claims were considered and rejected. The Government's brief, page five, impliedly concedes that these claims were considered and rejected.

If a claim for refund has been duly filed, the failure to insert therein a particular ground for relief is not a jurisdictional defect which would prevent the Commissioner from considering that ground. Jurisdiction having been granted to the Commissioner by the filing of the claim within time, he is not limited in the exercise of his jurisdiction to a consideration of the matters set out in the refund claim. This is evident from this Court's decision in *Tucker* v. *Alexander,* 275 U. S. 228, and *United States* v. *Felt & Tarrant,* 283 U. S. 269.

In the *Tucker* case, it was held that the Commissioner could waive compliance with the provisions regarding the form of the refund claim. In that case the taxpayer was permitted to recover because the Government upon the trial had not objected to the consideration of a question which was never presented by the refund claim and therefore never passed upon by the Commissioner.

In the *Felt & Tarrant* case, the claim advanced in the action was nowhere mentioned in the claim for refund or in the brief filed with the Commissioner or at the hearings before the Commissioner. The Court specifically mentioned this fact and proceeded to state:

> "One object of such requirements is to advise the appropriate officials of the demands or claims intended to be asserted, so as to assure an orderly administration of the revenue * * *."

And on the question of waiver, the Court said:

> "Here there was no compliance with the statute nor was there a waiver of its condition, since the Commissioner had no knowledge of the claim and took no action with respect to it."

In the instant case, however, the evidence shows and the Government concedes that the claims advanced in this action were advanced before the Commissioner and considered by him. Not only that, but after the institution of this action and for a period of over two years and up to the eve of trial, the Government made no question about the sufficiency of the refund claim to permit the raising of the questions raised by the petition. If, therefore, the Commissioner may waive strict compliance with the provisions regarding the form of a claim for refund, he has done so here.

As we see it, it is not a valid objection that the Commissioner was advised of and considered the claim after the statutory period for filing a claim for refund had expired. The claim had not been formally rejected and jurisdiction still rested in the Commissioner to consider the claim for refund for the year in question. That is the theory upon which the Circuit Court of Appeals proceeded, and we believe it to be a correct one.

POINT II.

The cases cited by the Government are not in conflict with the decision of the Circuit Court of Appeals.

The petition is based on an alleged conflict of decisions between the Circuit Court of Appeals in this case and the decisions in five cases therein mentioned which we shall consider in order.

In *Jonesboro Grocer Co.* v. *United States,* 66 Ct. Cls. 320, the taxpayer in March, 1918, filed its 1917 return, paying the tax shown to be due thereon. In July, 1919, the taxpayer filed an amended return for 1917 and a claim for refund of some $400 based on the amended return. The claim for refund was rejected but the Commissioner determined that the taxpayer had in other respects overpaid its 1917 tax and allowed an over-assessment of over $1,300, which the taxpayer accepted as a credit against its 1918 tax. At this stage it appeared that both the taxpayer and the Commissioner considered the matter closed. In 1924 and after the expiration of the statutory period for filing a claim for refund for the year 1917, the taxpayer filed a new and second claim for a refund of part of its 1917 tax which was in no way related to the first claim for refund and was not stated to be amendatory thereof. The Commissioner failed to note that the second claim was filed too late, considered and granted the claim, and notified the taxpayer that a certificate of over-assessment would be issued. Later the Commissioner discovered that the claim had been filed too late and rejected it.

In that case the claim originally filed had been fully and finally disposed of, and therefore there was no claim in existence which would jurisdictionally be the subject of

amendment or the subject of consideration by the Commissioner.

In the case of *Wassau Sulphate Fibre Co.* v. *United States,* 49 F. (2d) 665, the taxpayer never filed a claim within the statutory period. What it claimed to be a claim for refund was simply a letter to the Revenue Agent at Milwaukee requesting that its excess profits taxes be computed under certain sections of the statute, but contained no hint even that it was considered a claim for refund. After the statutory time for filing a claim had expired, the taxpayer filed a formal claim allegedly amendatory of what it called its formal claim for refund, viz., the letter to the Revenue Agent at Milwaukee. The Commissioner refused to accept the formal claim because it was filed too late and because it could not be considered an amendment of an original claim, because there was no original claim. The court sustained the Commissioner, holding that what was obviously not a claim could not be made one by amendment after the statutory time for filing claims had expired.

In the instant case there was a formal claim filed within the statutory period.

In *Swift & Co.* v. *United States,* 68 Ct. Cls. 97, 105, the only question was whether the time to file a claim ran from the certificate of the Commissioner to the Collector of an over-assessment or the signing of the schedule by the Commissioner. The court ruled that a credit was not allowed until the Commissioner signed the schedule, and that hence a claim for refund figured from that time was filed in time. This court specifically refused to pass upon the question of whether a second claim in that case was a mere amendment of the first, affirming the lower court's determination that the second claim was in time.

In *Feather River Lumber Co.* v. *United States,* 66 Ct. Cls. 54, the taxpayer filed a so-called claim for refund of a

portion of the tax paid for the year 1918. The Commissioner did not object to the sufficiency of the claim and allowed a refund thereon. In May, 1925, the taxpayer wrote a letter to the Commissioner calling attention to the fact that the Commissioner in auditing the 1918 return had failed to deduct a certain loss. The court held that suit could not be maintained on the matter set forth in the letter of May, 1925, for the reason that it did not in any sense constitute a claim for refund. The court pointed out that the requirement that the claim for refund must be filed was to give the Commissioner a chance to review his actions and to correct his errors, and that he could not do this if the taxpayer failed to advise him of the ground relied upon for recovery. Obviously, that condition did not exist in the case at bar.

In *Mutual Life Ins. Co.* v. *United States,* 49 F. (2d) 662, on August 2, 1927, the taxpayer filed a claim for refund of part of the tax paid for the year 1922. "This claim for refund was considered and wholly disallowed and rejected by the Commissioner of Internal Revenue on September 3, 1927." In December, 1928, after the time for filing claim for refund had expired, taxpayer mailed to the Commissioner a statement seeking a refund of nearly $600,000 of 1922 taxes. The court properly sustained the Commissioner in his contention that if he had rejected the first claim and the time for filing a new one had expired, it was too late to file a claim which could be made the basis of a suit.

It will be seen from a review of these cases that there is not one which lays down a rule contrary to that laid down in this case in the court below.

None of the other cases cited by the Government in its brief is contrary to the position taken by the respondent, but most of them rather support its contention.

Conclusion.

The petition should be denied.

Respectfully submitted,

JEFFERY & REDMOND,
Attorneys for Respondent.

JOSEPH F. MURRAY,
J. ARTHUR MATTSON,
Of Counsel.